

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

STRATASYS INC.,) Case No. 13-CV-3228 (DWF/JJG)
)
Plaintiff,)
)
)
vs.) St. Paul, Minnesota
) April 18, 2014
MICROBOARDS TECHNOLOGY, LLC) 9:10 a.m.
d/b/a AFINIA,)
)
Defendant.)
)

BEFORE THE HONORABLE DONOVAN W. FRANK

UNITED STATES DISTRICT COURT JUDGE

PLAINTIFF'S MOTION TO DISMISS AND MOTION TO STRIKE

APPEARANCES:

For the Plaintiff: Faegre Baker Daniels LLP
LAUREN MARIE WILLIAMS STEINHAEUSER, ESQ.
TIMOTHY E. GRIMSRUD, ESQ.
KENNETH A. LIEBMAN, ESQ.
90 South 7th Street, Suite 2200
Minneapolis, Minnesota 55402-3901

For the Defendant: Cantor Colburn LLP
WILLIAM J. CASS, ESQ.
20 Church Street, 22nd Floor
Hartford, Connecticut 06103

And

Haugen Law Firm PLLP
MARK J. BURNS, ESQ.
121 8th Street South, Suite 1130
Minneapolis, Minnesota 55402

Official Court Reporter: JEANNE M. ANDERSON, RMR-RPR
Suite 146 U.S. Courthouse
316 North Robert Street
St. Paul, Minnesota 55101

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1 **P R O C E E D I N G S**2 **IN OPEN COURT**

3 THE COURT: You may be seated, thank you. My
4 apologies for the late start. It was a security committee
5 meeting for the District that I had up, and actually there
6 is another little seminar going on downstairs in the jury
7 assembly room. So, we will proceed shortly.

8 If we can start on my right, Counsels' left? Do
9 you want to note your presence for the record and what
10 capacity you appear?

11 MR. LIEBMAN: Good morning, Your Honor, Ken
12 Liebman of Faegre Baker Daniels for the Plaintiff Stratasys.
13 And with me is my partner Tim Grimsrud.

14 MR. GRIMSRUD: Good morning, Your Honor.

15 MR. LIEBMAN: And Laura Steinhaeuser. And Mr.
16 Grimsrud will be delivering the argument this morning.

17 THE COURT: All right.

18 MR. BURNS: Good morning, Your Honor, my name is
19 Mark Burns from the Haugen Law Firm representing Microboards
20 Technology. And with me is Bill Cass of Cantor Colburn.

21 MR. CASS: Good morning, Your Honor.

22 THE COURT: Good morning.

23 MR. BURNS: Mr. Cass will be presenting the
24 argument.

25 THE COURT: All right. First I will represent to

1 you that I have had an opportunity to read the submissions
2 by counsel. And to the extent it is relevant, one of my
3 lawyer/law clerks has also done the same. And since each
4 Federal Judge, as most Bar members know in our District has
5 a very high patent load -- in fact just coming off a *Markman*
6 hearing from this past week.

7 But, I will have -- I will just put a couple of
8 issues out there for you each to comment on. Obviously, on
9 the one hand we have the defense saying the patents in
10 question, the two patents in question were fraudulently
11 obtained. And we have the Plaintiff here with their
12 motions, both on inequitable conduct, which is oftentimes --
13 even since the Federal Circuit has spoken, it frankly is
14 oftentimes, and rarely successfully pled and gotten before a
15 jury, as well as the affirmative defense issue.

16 But, one of the issues that I will be curious to
17 hear about, in light of the fact that in February -- I will
18 give you a specific date. There was the pretrial discovery
19 conference on February 18th.

20 I would like to know from each party is: One, did
21 you discuss with Jeanne Graham, yes, we'll be bringing this
22 motion? Yes. For the Plaintiffs, I will be curious to say,
23 yeah, we are letting everybody know we are coming on in on
24 these motions for the affirmative defenses and the
25 inequitable conduct. And if that was done, if the defense

1 then said, you know, we need some limited staged discovery
2 on that issue, because that is what I have seen over the
3 cases. And then I have had a couple of cases in the last
4 couple of years where we came back in a couple of months and
5 the plaintiff was able to convince me: Judge, it's like
6 what we told you two months ago. Then I ordered all of the
7 fees and all of the expense on the defendant saying: Motion
8 is granted. Now, let's get on with the rest of the case.
9 And defense is paying, because it is exactly as the
10 plaintiff suggested.

11 So, I will be curious to find out if that happened
12 with the Magistrate Judge, because one, obviously people
13 knew the motion was coming in. The Plaintiffs did. And
14 then two, obviously, the claim, with or without merit, the
15 Defendant is making is a common one, and especially in the
16 context of inequitable conduct. We need some limited
17 discovery.

18 We certainly can't wait until next year when the
19 discovery date is done next year in the middle of 2015.
20 But, we claim they are hiding, concealing, and this motion
21 is, therefore, premature. I would like to know if those
22 discussions were had with the Magistrate Judge. And if they
23 weren't, why not?

24 And assuming I rule on everything in front of me,
25 in a perfect world, I would have a memorandum and opinion to

1 you within 30 days. It won't be longer than 60. It might
2 be a little less than that. But, no complaints by me, it is
3 a busy, busy time. Although, I feel like I got a semi-lease
4 on life, because I was supposed to have been in my second
5 Wells Fargo trial for seven weeks. On Saturday night, this
6 past Saturday night, it settled. So, to my -- probably my
7 biggest surprise in my 16 years here. But, we will save
8 that for another day.

9 So, with that in mind, and I have read all of the
10 pleadings, including the 42 -- I think it was 42-page answer
11 by the defense, and counterclaim, so I am generally familiar
12 with that. And "porosity," I tried to educate myself a bit
13 on some of those issues.

14 So, with that in mind, we can proceed with
15 Plaintiff's argument. Now, I don't know if counsel
16 discussed it, I assume that absent either an objection or
17 something else that has been discussed, I can just hear you
18 out on the entire matter, rather than address one issue,
19 then the other. If that is acceptable, I will just hear you
20 out on both the affirmative defense issue and the
21 inequitable conduct.

22 And I may, without intending to create mood
23 lighting in the room, even though we all have monitors, and
24 including for the folks in the gallery, two of whom are
25 interns with my chambers, but I may dim the lights down on a

1 presetting just so anybody who wants to look at the screen,
2 it is a little easier to see.

3 So, with that, we can proceed when counsel is
4 ready. Excuse me. Whenever you are ready?

5 And it is always amazing to me, not unique to this
6 type of case, but when counsel come in -- not necessarily
7 local counsel -- local counsel that have national practices,
8 as your firm does. The sad trend, even though that trend is
9 by many fine jurists around the country, there is no one in
10 our District doing it. But, how oral argument now, a
11 majority of Federal Judges in this country, including our
12 own circuit no longer have oral argument on dispositive
13 motions of any kind, which is shocking to me for a lot of
14 reasons. But, we won't solve that here today. There are
15 probably some very good reasons. But, none of us here in
16 this District do it, and it is not coming here anytime soon.
17 So, whenever you are ready?

18 MR. GRIMSRUD: Thank you, Your Honor. We
19 appreciate the time this morning.

20 THE COURT: And I am going to probably dial this
21 down, now. I think you will still all have the lights on
22 you, but so then when we do use this -- all right? Okay?

23 MR. GRIMSRUD: Thank you.

24 THE COURT: Can you see sufficiently there?

25 MR. GRIMSRUD: Yes, perfect. Thank you, Your

1 Honor.

2 THE COURT: All right.

3 MR. GRIMSRUD: I have two exhibits, if I may
4 approach?

5 THE COURT: All right. You can bring those up.

6 MR. GRIMSRUD: Two copies of two exhibits, Your
7 Honor.

8 THE COURT: Thank you.

9 MR. GRIMSRUD: Your Honor, the first exhibit just
10 lays out, organizes the patents at issue in the two motions
11 that we are talking about today. There are four patents in
12 the case which Stratasys has asserted. Two of them are what
13 the Defendant has brought the inequitable conduct motion
14 on --

15 THE COURT: Right.

16 MR. GRIMSRUD: And then that is the 12(b) (6). And
17 then for each of our four patents, they have a -- we have a
18 Motion to Strike their Affirmative Defenses of Patent
19 Misuse.

20 And Your Honor, as the Court noted, with
21 inequitable conduct, I will start with the Inequitable
22 Conduct 12(b) (6) Motion. And with inequitable conduct, the
23 pleading standard is very high for inequitable conduct.

24 The Federal Circuit, the test for inequitable
25 conduct is very high, also. You have to show "but for"

1 materiality, meaning if a reference was withheld, the patent
2 would not have issued but for a reference being withheld.

3 And then, also, a specific intent to deceive the
4 Patent Office by a specific person. And the Federal Circuit
5 sets forth a very high standard under Rule 9(b) for pleading
6 inequitable conduct, where the Defendant has to allege facts
7 that plausibly show the "but for" materiality, meaning the
8 who, what, when, where, how of all this alleged reference
9 resulting in invalidity is being withheld.

10 And then also, secondly, even if materiality is
11 alleged, the specific individual facts that plausibly show
12 that a specific individual knew of the information and
13 withheld it with specific intent to deceive the Patent
14 Office -- and you can't rely on conclusory allegations, it
15 has to be factual allegations. So, what we have brought
16 today is this Motion to Dismiss.

17 And to Your Honor's comment about, really, a case
18 management issue, we did in our 26(f) report specifically
19 agree that the Defendant could seek discovery, reasonable
20 discovery of defenses relating to unenforceability, which
21 would be inequitable conduct. Also, patent issues is an
22 unenforceability --

23 THE COURT: But, I didn't see anything in there
24 about let's do that within the next X number of months and
25 end it on this date. Because one of the big concerns and

1 why the Federal Circuit stepped in as they did, I am quite
2 certain, when they did and how they did it in the patent
3 cases I have seen over the years, I have seen those
4 concerns, is -- well, we will have this for lack of a legal
5 phrase, "fishing expedition" and it defeats the whole
6 purpose if there is not staged or limited discovery, because
7 there is going to be all of this work done.

8 And so, usually, it is more common to see, well,
9 with or without agreement somebody pushes -- in our District
10 it typically is the Magistrate Judge, to say: Well, let's
11 have then a very limited in scope period of discovery, so it
12 is done at a certain time. So, it's either the motions are
13 either granted or denied, rather than, well, the sky is the
14 limit, we will see you -- there is just one discovery date
15 limit, as opposed to a staged -- whether that magical period
16 is 60 days, 90 days, say on an issue like this.

17 And I am referring more now to the inequitable
18 conduct, because in the affirmative defense issue, unless
19 there is an allegation which sometimes is made at the case
20 management or in the 26(f) report, if one or more of these
21 are alleged irrespective of how they are pled, here is how
22 it will change the scope of discovery. Then, in that case,
23 and sometimes there is again staged discovery to say, with
24 these affirmative defenses in, here is how we claim
25 discovery is going to be so much broader or with the amount,

1 or sometimes there is no difference. And then the first
2 time the Judge encounters it is at *in Limine* motions or a
3 summary judgment motion. And out some of them go, if they
4 are going to go, unless the discovery issue is raised early
5 on saying: Here is what is going to happen if these don't
6 go early. So, that is kind of what I was asking about.

7 MR. GRIMSRUD: Uh-huh. There was no discussion,
8 Your Honor, about phased discovery or anything like that.
9 There was discussions about basically what I have said,
10 about if you do intend to amend the pleadings to, you know,
11 add a claim, you'll need to seek discovery and then
12 diligently amend the pleadings. But, no discussion -- just
13 kind of the standard rules for that.

14 THE COURT: All right.

15 MR. GRIMSRUD: But there was no discussion about
16 phased discovery.

17 THE COURT: Okay.

18 MR. GRIMSRUD: But, Your Honor, we are seeking to
19 dismiss their inequitable conduct claims, but we recognize
20 that they made a reference to us trying to block their
21 discovery. That is not what we are trying to do in the
22 case.

23 We recognize that they are entitled to seek
24 reasonable discovery, and then, if appropriate, amend. We
25 don't think there is an inequitable conduct claim in this

1 case, but to the extent they discovered something that they
2 thought was worthy of amending their pleadings, then they
3 could seek leave to do so.

4 THE COURT: And of course, I don't mean to
5 interrupt your argument, but of course you know what they
6 are saying, apart from the concealment issue. They are
7 saying, hence -- and I will raise one issue, perhaps, and if
8 it is in here -- and it typically is, especially -- not so
9 much in a patent case, but in this setting -- but oftentimes
10 it is. Even before *Iqbal* and *Twombly*, it was an issue with:
11 Well, if you are going to dismiss that claim, is it with or
12 without prejudice to renew it at some later date?

13 But, setting that aside, obviously you know they
14 have used their words in their opposition brief that is not
15 uncommon to say, well, we are claiming it is premature for
16 you to be hearing this because -- well, and then as you
17 said, that is because they don't want us to see any
18 discovery, because they know what it is going to show. That
19 is really what they are claiming, implicitly, explicitly.

20 So, but what you are suggesting is that: Well,
21 they don't have enough. It hasn't been pled. And this is a
22 Rule 12 setting. So, it should go by the wayside. And then
23 the issue will be then, of course, is with or without
24 prejudice -- I am talking now about the inequitable conduct.

25 MR. GRIMSRUD: Yes. Right, Your Honor, and the

1 Federal Circuit has set up this structure to -- they have
2 been very explicit about the gatekeeping rule, not wanting
3 inequitable conduct coming right out of the gate in these
4 patent cases. You need to have the facts. You need to have
5 the specific basis for alleging inequitable conduct.

6 And we did tell the Defendants that when they
7 first answered and asserted inequitable conduct, and we had
8 a meet and confer. They sought to amend the pleadings. We
9 agreed to allow them to. And then we are back in the same
10 place. And the reason is because they really don't have any
11 basis to be asserting inequitable conduct.

12 And I will put an example up on the screen, Your
13 Honor. This is from their Count 9 on inequitable conduct
14 with respect to the '925 Patent. And it really --
15 paragraphs 52 through 54 is kind of where it boils down.
16 And says, "The inventor of the '925 Patent was aware of the
17 '329 Patent and intentionally withheld it from the Patent
18 Office."

19 There's all sorts of problems with this
20 allegation. First of all, it fails as a matter of law
21 because they don't actually allege intent to deceive the
22 Patent Office. And there is certainly no facts in there
23 about intent to deceive the Patent Office.

24 And with respect to the inventor being aware of
25 the '329 Patent and intentionally withholding it, they

1 simply have no basis for these allegations. That is a
2 conclusory allegation. It is right in the wheelhouse of
3 what *Exergen* says from the Federal Circuit about, you can't
4 just aver the substantive elements, you need to allege facts
5 that could reasonably support the allegation.

6 And the reason they don't -- again, we don't
7 believe there is any inequitable conduct in the case, but
8 they certainly have no basis for making these types of
9 allegations. They don't know anything about what the
10 inventor knew or didn't know, or did or didn't do. There
11 has been no depositions. There is just no facts that they
12 are aware of to support their claims, which is exactly what
13 the Federal Circuit says is grounds for dismissing these
14 claims --

15 THE COURT: If I may ask this, and I know there is
16 an issue in the case where you are saying, well, there is a
17 distinction between -- and that is not unique to patent
18 cases between what is pled in the complaint or the answer or
19 counterclaim and what is in the brief.

20 Well, looking at what the -- and to the extent it
21 is relevant, I am looking at page 6 of their brief. It
22 said -- in both instances they are talking about the '058,
23 '925. "The applicants made overt misstatements concerning
24 the prior art and withheld material information concerning a
25 prior art patent and products from the PTO."

1 And then they go on to say, "This is our basis for
2 the inequitable conduct and patent misuse." We will just go
3 with inequitable conduct. So, what you are saying is:
4 Well, classic conclusory statements, and of course on the
5 specific intent issue you know what the Defendant has said,
6 and it is oftentimes said, again not unique to patent cases,
7 but where this concept of specific intent is: Well, one,
8 you can't get in the minds of people; and two, the inference
9 is jumping off the pleadings that they did it intentionally.
10 And with what we have pled, there is more than a reasonable
11 or plausible inference of specific intent.

12 So, obviously, that is where the two of you part
13 company, because I will have to either say: Yes, it is
14 conclusory; or no, it is not. But that is where the two of
15 you part company.

16 And of course, there is a second tear, I suppose,
17 and again I will be quiet here in a moment, but the second
18 tier where you have talked about the specifics in
19 materiality in terms of the claims and limitations,
20 themselves. They have to go into the patent, whether it is
21 the '329 and say here is specific -- or, as they have
22 alleged, the patent that your client had, and specifically,
23 the prior art.

24 And you are suggesting that they also haven't
25 said: Well, it is just not enough to refer to the patent.

1 And I suspect the defense is going to get up and say: Well,
2 that is why we gave you that two or three-page tutorial.
3 Because we wanted to show you, well here if it is not plain
4 what we are claiming, here it is. And by tutorial I am
5 talking about their two or three pages in there, their
6 responsive memorandum.

7 But, I will try to stop talking here, but
8 obviously, those are kind of the issues that have been laid
9 out in front of me. And they are common -- I would expect
10 to see those in this inequitable conduct when that issue has
11 been put in front of me at this stage of the case.

12 So, I guess I will let you kind of tell me what is
13 most important for me to know today, and we will go from
14 there.

15 MR. GRIMSRUD: Yeah, Your Honor, I will address
16 those comments. I guess for the intent issue and what is
17 conclusory and what is not conclusory, I think one way to
18 view it is a spectrum. On the one hand, there is conclusory
19 assertions. The other end of the spectrum is going to be
20 something that is extremely specific, and in the middle
21 there could be a gray area.

22 Here we are at the conclusory end of the spectrum,
23 because as far as what the inventors knew or what the
24 inventors did, this is pure conjecture on their part. They,
25 for materiality, you are right that we have also explained

1 in our briefing how these references -- we don't believe
2 they have alleged materiality. They haven't explained how
3 they are not cumulative, how they would result in invalidity
4 but for their omission from the Patent Office.

5 And on the '329 Patent, for example, that is at
6 issue for the '925 Patent? The '925 Patent is about,
7 generally about this predetermined porosity, is what it is
8 called. The '329 Patent, you can read it -- the word
9 porosity doesn't even appear in the '329 Patent. So, that
10 is the kind of thing where you need factual explanations for
11 why this isn't cumulative, why the Patent Office would not
12 have allowed the claims in view of that reference.

13 But, the intent, there is just no allegations of a
14 specific individual having known of specific material
15 information, and then intentionally withholding it with an
16 intent to deceive the Patent Office. There is just no
17 allegations, whatsoever.

18 And really what their claim comes down to is they
19 are saying -- I think what they will say is, well, these
20 inventors knew of these references. In the case of the '058
21 Patent, knew of this prior product, the 1650, because they
22 were developed by Stratasys. This '329 Patent has a
23 Stratasys person as the inventor.

24 But, that would be an end-run around pleading
25 inequitable conduct. Because basically what they are

1 saying, then, is anytime a defendant can find prior art that
2 is of the plaintiff's, if they can somehow say it is
3 material -- which again we don't think they have -- but if
4 they can allege it is material, then that satisfies the
5 intent requirement, which would basically mean anytime the
6 defendant finds prior art that is not disclosed by the
7 plaintiff, that is the plaintiff's own stuff, that is enough
8 to allege inequitable conduct, which we believe the Federal
9 Circuit has said that is not the case.

10 There are actually cases saying things like even
11 articles that are authored by an inventor are -- failure to
12 disclose those does not establish intent to deceive, because
13 you need to show specific intent to withhold the reference
14 and to deceive the Patent Office.

15 Also, another problem with their pleading, which
16 is really highlighted from their brief is how they don't
17 focus on a specific person. They talk about the inventor
18 shown in paragraph 53, there. They switch to Stratasys'
19 failure in their brief. They talk about -- it appears they
20 are talking about the prosecuting attorneys that are
21 involved. So, they are all over the place on what happened,
22 who did what, which is the kind of conclusory, unspecific,
23 allegation of unethical conduct that should not be
24 permitted.

25 THE COURT: Well, it seems to me you touched on

1 it. I don't want to oversimplify this argument. And I am
2 trying to read my handwriting here in my notes. But, I
3 think the reason they introduced the tutorial is they used
4 the phrase, quote, "the very features" and then they go on
5 to say something you said a minute ago. Well, Judge --
6 these are my words, not theirs. They are saying: Look
7 closely, Judge, if we take the phrase "adjusting the rate of
8 dispensing to provide a predetermined porosity," they are
9 saying, look carefully, because that was all disclosed, that
10 was all in that prior art.

11 And if you understand that, Judge, you will
12 understand why we claim they fraudulently obtained these
13 patents. That is separate from the argument that you both
14 touched on about: Well, they are trying to maintain a
15 monopoly in this area of technology.

16 But, that is really kind of what they are saying.
17 And you touched on the porosity piece a moment ago, but that
18 is in effect -- and I guess we are at the stage now where --
19 and then I'll -- I promised I would before stop interrupting
20 your argument.

21 But, where -- obviously, I will have to either
22 agree in whole or in part with you, or disagree. But then I
23 think before you are done, whether it is now or in rebuttal,
24 I think I would like to make sure I understand the -- at the
25 end of the day saying: Well, because I suspect there is

1 going to be an issue -- well, let's just say as an example,
2 I come your way on the inequitable conduct.

3 You suggested, well, they should have waited to
4 amend, because discovery may show, if they are going to have
5 it, they haven't shown it. Well, and I actually thought
6 that maybe that is what you were trying to avoid is this:
7 Well, we don't want to have this limitless discovery, so
8 unless you shut it off now on inequitable conduct, because
9 that is obviously something that a lot of judges have
10 commented over the years, it opens up the floodgates.

11 I just want to make sure I understand, not just --
12 obviously, you have kind of put clearly through the merits,
13 but, procedurally, where you think this should be at the end
14 of the day, too.

15 Because I think you suggested that, well, let's
16 just say, for example, I granted the motions. To the extent
17 they say it is premature, you assume they will be back. If
18 the discovery -- as opposed to you saying, if there is a
19 motion to compel saying: Look it, the Judge has already
20 dismissed that claim. Why are we going into this, this, and
21 this? Because that is sometimes an issue early on in the
22 case, too. You either have a showing of inequitable conduct
23 or you don't. And if you don't, then that should end the
24 inquiry early on so it doesn't go on ad infinitum.

25 But, anyway, I will sit tight, here. And you may

1 be saying: I've already answered that question for you,
2 Judge, well then you can move on if you wish.

3 MR. GRIMSRUD: Your Honor, as we acknowledged in
4 the 26(f) report, we recognize that there can be reasonable
5 discovery, but there is definitely a point in time where it
6 would become too late to add inequitable conduct. Our
7 position is, they would need to diligently seek leave to
8 amend. And if they -- you know, if they don't do so, then
9 they wouldn't be allowed, in our view, to have inequitable
10 conduct --

11 THE COURT: And of course it is true, apart from
12 this case and inequitable conduct, there is in every order a
13 separate deadline to amend. And then sometimes that
14 corresponds with some staged discovery. Oftentimes it is
15 like this. There isn't that staged or limited discovery,
16 but there is that deadline that kind of self imposes that
17 for a -- to amend.

18 And obviously, I will rule on what is in front of
19 me. I am not going to kick the can down the road, but I
20 will rule on what is in front of me. And I will be curious,
21 you know, how -- whether it comes from the plaintiff's side
22 or defendant's side, not unique to patent cases where a
23 lawyer alleges or a party alleges: Well, we claim this
24 motion is premature and here is why. Of course, it is a
25 little bit different if it is in a summary judgment setting,

1 of course, as you know. But, we will see how they handle
2 that, because that was kind of what they suggested.

3 And then, of course, the issue is: Well, whether
4 that is true or false, what is the remedy for that? And you
5 have addressed that. So, I will cease interruption and let
6 you tell me what is most important for me to know for your
7 client. So --

8 MR. GRIMSRUD: No, thank you, Your Honor. And
9 there is deadlines for amending. And as we said in our
10 brief, to the extent they were going to amend, we believe
11 they need to seek leave under the Rules, follow the
12 procedure for amending, and all of that.

13 On the tutorial I want to touch on that, as well.
14 None of this is in their pleading. So, they introduced
15 quite a bit of documents in there -- and arguments in
16 their --

17 THE COURT: And I acknowledge you raised that in
18 your reply brief.

19 MR. GRIMSRUD: Yes. We raised that, yes. And
20 that is also -- they have talked about additional facts that
21 they would like to use if they did some day seek leave to
22 amend, including -- but, including for the porosity patent,
23 they actually say the FDM 1500 product. So, that is an
24 example of them shifting around.

25 You know, now they are talking about a different

1 product, totally different than this '329 Patent they are
2 talking about in their pleading. So, we think there is a
3 real problem here of conclusory allegations, their shifting
4 theories, they don't identify a specific person. They go
5 back and forth between one inventor, both inventors. Is it
6 Stratasys, as a whole? The company as a whole? Is it all
7 the applicants, whoever that would include that were
8 involved in filing the patent?

9 So, to sum it up on inequitable conduct, they
10 don't allege the specifics for materiality. And they don't
11 identify a specific person who knew of material information
12 in a reference and then withheld that information from the
13 Patent Office with an intent to deceive the Patent Office.
14 They have no factual allegations to support that.

15 And really, their argument is to try to show
16 intent. It appears to be that, well, these were Stratasys'
17 products. This is a Stratasys patent, so therefore the
18 inventor has intended to deceive the Patent Office. That is
19 not a reasonable inference. That is just conclusory.

20 And again, it would be an end-around the pleading
21 requirement by basically saying that anytime the plaintiff
22 has prior art that wasn't disclosed, you can infer intent to
23 deceive. And the Federal Circuit has rejected that type of
24 argument.

25 THE COURT: And not to be -- for me, I'm not

1 saying for you, but for me, not to be repetitive, aren't
2 they in effect saying -- and then it comes back to, separate
3 from the premature and discovery issue, it comes back to,
4 well, either it is conclusory or it is not. I was looking
5 at some other notes I had.

6 In effect, what they are saying is because the
7 features are so common -- and another one they mentioned is
8 the altering the percentage of fill. They are saying
9 because these features are so common, Judge, by not
10 disclosing this prior art, they knew if they did, the show
11 was over, that they would not receive their patent.

12 And what you are saying is, well, one, you are
13 saying part of this is in the brief, not in the pleadings.
14 And the other thing you are saying is no matter which place
15 it is, it is conclusory assertions that doesn't fit the 9(b)
16 and the Federal Circuit's test they put together that is
17 essentially a 9(b) with some individualized holding with
18 respect to patent cases; but, that is, in effect, I think,
19 what you are saying?

20 MR. GRIMSRUD: Right, and that there are zero
21 factual allegations about specific intent to deceive or
22 withholding of any of this material. You know, setting
23 aside whether or not -- you know, there are issues of
24 whether or not inventors knew of things, and then also the
25 relevant inquiry is did they know of what is allegedly

1 material? And then did they withhold it with a specific
2 intent to deceive the Patent Office? And there is no
3 factual allegations that go to any of that, of the intent
4 elements.

5 THE COURT: Well, and it will be -- and again,
6 this may be semi-repetitive of what I just said, but we will
7 know for sure when the defense takes the podium. Because,
8 not to oversimplify your position over theirs, but they seem
9 to be suggesting, and hence -- and I have used that phrase
10 before -- this mini-tutorial that: Well, it is so obvious
11 if one takes a look at these two patents, that anybody
12 skilled in the art would have known if we disclosed this
13 prior art, these patents will not and can not be obtained.

14 I mean, that seems to be -- and I anticipate in
15 part they are going to say: Well, our burden isn't that
16 high to say that, well, unless it appears to the court that
17 it's so obvious, these features and these limitations are so
18 obvious that no one could possibly think otherwise, so hence
19 the materiality and specific intent.

20 And you are saying, clearly, in your argument
21 today and in your briefing, assuming I have not
22 oversimplified their position or over-characterized it. You
23 are saying: Simply not enough. Saying it so doesn't make
24 it so is in part what you are saying.

25 MR. GRIMSRUD: Yeah, that is in part what I am

1 saying is that you have to have specific allegations that go
2 to the intent element. And without them, you are out of
3 luck.

4 Also, with the comments about it being so obvious,
5 those allegations are not in the Complaint. And as I was
6 saying before, the '329 Patent actually doesn't even talk
7 about porosity. So, to say that it is so obvious to connect
8 the two would be a pretty big leap. And it is certainly not
9 in their pleadings. But, the '329 Patent doesn't talk about
10 porosity.

11 And then to touch on the other patent, the '925
12 Patent -- or sorry, the '058 Patent where the inequitable
13 conduct claim there is directed to this prior device, the
14 FDM 1650. And it is the same problems on the allegations of
15 the intent to deceive. They don't have anything. They
16 shift between inventors and Stratasys. They don't have any
17 factual allegations that a specific person withheld that,
18 knowing that it had allegedly material information in it,
19 and then also with intent to deceive the Patent Office. So,
20 their pleadings on Count 10 of the inequitable conduct fail
21 for the same reasons.

22 But, then, also, the patent in that case, they
23 talk about how -- they talk about how the prior FDM 1650
24 device was able to heat up to 70 degrees.

25 THE COURT: Right.

1 MR. GRIMSRUD: Well, they don't explain how that
2 ties into a claim limitation, for one, which is a big
3 problem of materiality, which the Federal Circuit talks
4 about how for materiality, you need to show things like
5 facts going to the what, when, where, the how, so where
6 exactly is this feature that was allegedly withheld in the
7 claims?

8 And they don't identify any claims in the patent.
9 They certainly don't identify claim limitations. And what
10 they do talk about is how the specification of the patent
11 talks about it being -- the temperature range being between
12 70 and 90 degrees.

13 Well, what they are saying about this prior FDM
14 1650 device is that it went up to 70 degrees. The
15 specification talks about 70 to 90. So, 70 degrees isn't
16 even within the 70 to 90 range. And the claims, actually --
17 this is where it is important to look at the claims, because
18 the claims of the patent talk about how the temperature has
19 to be above the solidification temperature. So, if what
20 they are saying is that the solidification temperature is 70
21 degrees, the claims are saying it has to be above that.

22 So, this FDM 1650 device, they haven't even shown
23 that is above 70 degrees. So, they haven't, they have not
24 explained how it could possibly be material. And that's one
25 example of the problems with not alleging the factual

1 allegations of what exactly is material, what claim are we
2 talking about, what claim limitation is relevant, where
3 exactly in the claim limitation is this information that was
4 withheld?

5 They don't do any of that in their complaint, or
6 in their counterclaim, which is why they also -- one of the
7 reasons why they also fail to allege "but for" materiality.
8 And as I said, on Count 10, they also don't allege any
9 factual information to suggest that a specific person knew
10 of this allegedly material feature and withheld it with a
11 specific intent.

12 THE COURT: All right.

13 MR. GRIMSRUD: So, Your Honor, I will move on to
14 the patent misuse claims briefly of the Defense'. I will
15 put an example up on the elmo. Their allegations of patent
16 misuse are -- we explain this in our brief, but they are
17 essentially the same for all of their patent -- all four of
18 their patent misuse defenses, is that they say it is the
19 assertion of the patent against them that constitutes patent
20 misuse. So, they say that Stratasys by asserting, in this
21 case, the '925 Patent against any Afinia -- I think it is
22 supposed to say, any Afinia product constitutes patent
23 misuse.

24 And then I will give another example. This is the
25 ninth affirmative defense for the '058 Patent. They have

1 the same allegations that in this case the assertion and
2 continued assertion of the '058 Patent against any Afinia
3 product constitutes patent misuse, then they go on to say
4 the assertion of the '058 Patent again Afinia is an attempt
5 by Plaintiff to achieve a monopoly in the market.

6 So, their patent misuse defenses are all based on
7 this theory that Stratasys' assertion of the patents against
8 them is patent misuse. And as we explained in our brief,
9 Congress, the Federal Circuit is clear that asserting a
10 patent against somebody is not patent misuse.

11 Section 271(d) of Title 35 says, asserting a
12 patent is not misuse. Then the Federal Circuit elaborates
13 on that and says: That is right, even wrongful assertion of
14 your patent -- even if the Plaintiff, for example, is wrong
15 on the issue of infringement, that is not patent misuse.
16 Because the Plaintiff has the right to assert patents. So,
17 that is not patent misuse. There's narrow exceptions that
18 we have explained in our brief.

19 THE COURT: And you are saying that whether it is
20 the fraud or the sham or the other exceptions
21 inapplicable -- and the two of you part company there,
22 but --

23 MR. GRIMSRUD: Well, we actually -- we explain
24 how -- we do explain how their fraud exception does not
25 apply.

1 THE COURT: Right.

2 MR. GRIMSRUD: They have not alleged that. Same
3 with the sham exception. To show sham, you need to allege
4 things like the litigation, as a whole, is objectively
5 baseless.

6 And then in addition, that the lawsuit is being
7 brought for no purpose other than an anti-competitive effect
8 to harm your competitor. So, it is very high for the sham
9 exception, as well. And we went into detail on that in our
10 brief. And in their response brief, they ignored it all.
11 They didn't say anything about 271(d), they didn't say
12 anything about any of these Federal Circuit cases we cited.
13 They didn't say they met the fraudulent exception. They
14 didn't say they met the sham exception. They literally
15 ignored our argument on that, which in our view means they
16 have completely abandoned their patent misuse theory.
17 Because the only theory they have is this theory of
18 assertion of the patents, and that is it.

19 Instead, what they have done in their response
20 brief is switch to this other theory based on licenses that
21 Stratasys has with its customers, not Afinia. So, they are
22 saying that the misuse somehow results from license
23 agreements that Stratasys enters into with its customers.
24 And we have explained in our brief how, one, that theory
25 isn't pled. That is not a basis of the misuse.

1 They allude to the license in some paragraphs, but
2 they don't say that the license is patent misuse. The only
3 patent misuse theory was the assertion of the patent which
4 is legally foreclosed by law, which is one of the, you know,
5 key reasons for having Rule 12(f) for striking defenses when
6 they are foreclosed by law. And they don't address it,
7 which means they have abandoned it, in our view. So, that
8 should be clearly out of the case.

9 And then they license -- so, the license theory is
10 not pled. In addition, they don't have any case law
11 supporting it, and the Federal Circuit is clear that patent
12 misuse isn't this catchall defense that you can allege for
13 any type of what you think is wrongful conduct. You need to
14 be -- this is in the *Princo* case from the Federal Circuit.
15 You need to be in very narrow areas where patent misuse is
16 recognized. And they haven't -- they don't fall into any
17 category that they have shown a case for that supports
18 patent misuse.

19 In addition, their theory is very -- it is kind of
20 speculative in the extreme, I guess you would say. Their
21 theory is essentially that this license that Stratasys has
22 with customers includes various -- a grant-back provision
23 where Stratasys would get a non-exclusive license to use
24 certain property of their customers to the extent the
25 property is based on Stratasys' intellectual property. And

1 they are saying that means that Stratasys gets grant-backs
2 for expired patents.

3 And there is no evidence at all that Stratasys or
4 anyone has ever interpreted that license to include expired
5 patents. You know, the reasonable reading would be, if it
6 says patents, you are talking about patents in force, not
7 expired patents.

8 So, there is no -- it is totally speculation. It
9 is an unreasonable reading of this license agreement. It is
10 not supported by law. We think this kind of theory, in
11 addition to not being pled, is a waste of time and
12 immaterial, because it is not a relevant issue. And so,
13 that is the reason for striking it.

14 THE COURT: Again, not to oversimplify the
15 position of either party, but the theme -- whether there is
16 a changed theory or not, we will see how Defendant responds
17 to that that you raised in your brief and today. But, a
18 theme throughout this, and then the question is well just
19 how far does it reach and how is it pled, is the fraudulent
20 obtainment of the patents.

21 And I anticipate hearing about, well, there is,
22 after all, this fraud exception. And of course, you have
23 discussed that with respect to the inequitable conduct.
24 But, that is kind of the theme that I think is through the
25 answer and counterclaim of the defense. But, we will see if

1 that is a key issue here that is relevant to the affirmative
2 defenses that have been pled.

3 MR. GRIMSRUD: And Your Honor, again, I will
4 finish up here. But, the fraudulent obtaining exception for
5 patent misuse, that is not addressed in -- you know,
6 Defendants don't address that in the brief. In our view
7 they have abandoned it and gone on to this different theory
8 based on a license. So, in their brief, they don't argue
9 about fraudulent obtaining the patent as an exception for
10 patent misuse.

11 Also, another point is that with these affirmative
12 defenses of patent misuse, they have only asserted
13 inequitable conduct for two of the patents, so for two of
14 the patents they haven't even tried to assert inequitable
15 conduct, which you would think means there is no chance that
16 there is fraudulent obtaining for the '124, or the '239
17 Patents.

18 And to the extent inequitable conduct is
19 dismissed, there couldn't possibly be a fraudulent obtaining
20 exception for the '925 and '058 Patent. If they haven't
21 pled inequitable conduct, there is no way they could plead
22 fraudulent obtaining --

23 THE COURT: All right.

24 MR. GRIMSRUD: -- which actually some courts say
25 would have a higher standard to allege fraudulent obtaining

1 the patents if there's actually fraud on the Patent Office.

2 But again, they haven't addressed any of this in
3 their briefing with respect to their patent misuse defense
4 that would be based on fraudulent obtaining. So, it will be
5 interesting to see what they say, but in their briefing they
6 did not address any of the possibilities of exceptions to
7 271(d), so in our view, all of their patent misuse defenses
8 should be stricken.

9 THE COURT: All right?

10 MR. GRIMSRUD: Thank you.

11 THE COURT: Thank you. And there will be time for
12 rebuttal.

13 MR. CASS: Good morning, Your Honor.

14 THE COURT: Good morning.

15 MR. CASS: It will take me a minute to set up.

16 THE COURT: You know, the last few weeks when
17 people have been coming here, lawyers from around the
18 country for different things, they are questioning the
19 calendar. I don't mean the Court calendar, I mean the
20 calendar that says it is supposed to be springtime in
21 Minnesota.

22 MR. CASS: I have to laugh, Your Honor, because I
23 actually live in Massachusetts and commute to Hartford and I
24 live in a little farm town. And we had an inch and a half
25 of snow a few days ago.

1 THE COURT: Oh, you did, did you?

2 MR. CASS: I sympathize. Hopefully I can do this
3 correctly. Hey, how about that? I have previously given --

4 THE COURT: Yes, I have it.

5 MR. CASS: -- the presentation.

6 So, what I would like to begin with is, if the
7 Court permits this, with the inequitable conduct and the
8 *Exergen* standard which says -- it does tell us that you can
9 make a reasonable inference from the facts that are before
10 you. Because, after all, specific intent, unless you have a
11 smoking gun, you are never going to get that in this case.

12 And there are three other cases that I cited in my
13 brief that I think are extremely important for the Court to
14 consider. And those three cases are the *Aventis Pharma*
15 versus -- these are all post-*Therasense* cases.

16 The *Aventis* case is interesting because it is
17 almost all on all fours with this case. It involved a
18 situation where the inventors disclosed prior art discussing
19 the problem to be solved, the problem they were trying to
20 solve. But, they didn't disclose the art that was relevant
21 to how you would solve the problem.

22 And also, the *W.L. Gore -v- Medtronic* case, that
23 was a case with an intraluminal stent graft, and they made
24 statements about the prior art, which were false. And I am
25 going to explain in a minute why we have that here. And

1 then the *Cumberland Pharm.* case where, like here, you had
2 prior use of their own product. You had failure to disclose
3 the prior art, and failure to show what was being marketed.

4 So, kind of with that in mind, I want to just talk
5 a minute about my little technology tutorial, because it is
6 a kind of an interesting technology. It prints
7 three-dimensional parts. And as Your Honor might know from
8 our brief, when we talk about the -- there are two things.

9 One is, how dense are you laying down the goop,
10 the plastic, right? And I call that road width, but it can
11 also be the fill percentage. That is how we get into the
12 whole porosity thing.

13 And the second thing is the temperature which
14 basically the heating cabinet is maintained. What is the
15 temperature at the heating cabinet? So, the first one, the
16 porosity one is the '925 one that is talking about porosity;
17 and the second one is the heating cabinet, which is the '058
18 in terms of inequitable conduct. And I think we all
19 understand the concept of road width.

20 So, the first thing I want to talk about is the
21 '058 Patent. If you look at that patent, Your Honor --
22 perhaps I can switch over to the elmo, too, if I am artful,
23 but nearly every passage in that patent is about maintaining
24 that heating cabinet between -- and it is not above 70, it
25 is between approximately 70, to approximately 90. That is

1 the words that are cited in our counterclaim.

2 It is not above. He said in his argument papers
3 that it was above. And as Your Honor may know from these
4 cases, under the *Titanium Medical Products* case, if you are
5 within a range -- if something is important within a range
6 in patents, and you are anywhere in that range, that is an
7 invalidating circumstance.

8 So, I wanted to correct that, because the phrase
9 is approximately 70 to approximately 90. And before they
10 applied for this patent and put all of these figures in this
11 patent, and they were disclosing and representing to the
12 Patent Office just like in these three cases I cited, they
13 are making a representation to the Patent Office: We
14 discovered something unique. If you maintain between 70 and
15 90, each time you put a new layer on, it is going to meld
16 together better, is what they are saying throughout the
17 entire patent. And their own equipment did it.

18 And if you go back, if you look at the table --
19 this is just an example of the figures. Every major figure
20 in the patent talks about depositing it in this very
21 specialized window. And their own prior art said maintain
22 it at 70. So, it is within that window on every single
23 figure. And that is really the crux of the -- oh, also,
24 they represented ABS plastics were novel, too. But they
25 were using ABS plastics years before.

1 And they made this representation, the prior art
2 they cited, none of the prior art on the face of the '058
3 Patent, if you look at the prior art that he made his
4 statements about, none of them mentioned ABS plastics, and
5 none of them mentioned this 70 degree temperature range,
6 which is what the entire patent is about. Okay?

7 So, like *Aventis* and *W.L. Gore* and *Cumberland*
8 *Pharm.*, you have overt misrepresentation on the part of the
9 inventor about what the patent -- the problem to be solved
10 is in the patent.

11 THE COURT: Now, what of their both today and in
12 the briefing saying: Well, one place Defendant's say
13 inventor, the next one they use the entity's name. Another
14 one they -- what is most important for me to know about --
15 you heard the arguments, I won't repeat it. And if you are
16 going to comment on it later, I will just sit tight on the
17 naming with particularity, or the specific individual or
18 individuals.

19 MR. CASS: Well, it's funny, because it used to be
20 you tried to be gentlemanly in your pleadings, now I see I
21 should have been a little more aggressive. But, clearly,
22 Mr. Crump -- and I pointed this out in my reply briefs. We
23 have the evidence in spades. He is Chairman of the Board.
24 He signs the press releases all about the 1650 and the 1600
25 going out.

1 If the Court were to find that this, in and of
2 itself isn't enough, because here you have an overt
3 misrepresentation of their own product, of their own product
4 to the Patent Office, okay? If the Court were to find that
5 wasn't sufficient, we could easily plead what we would need
6 to do to include Mr. Crump. And we can relate it to the
7 claims, I think, under the nature of the prosecution of this
8 case.

9 This was a case where there was just a first
10 office action allowance. It just went poof. And it went
11 poof because they withheld something that was right in the
12 range of what they are claiming was novel with the specific
13 ABS plastic. And if you look at the prior art patents I
14 cited, that was one overt misstatement. And I did include
15 the other one in my brief.

16 But, look what he says, look what they say about
17 the prior art. They say, they identify the '329 Patent,
18 that they didn't put of record in the other one. So, here
19 is evidence that they knew about it, anyway. Because, that
20 was his patent.

21 So, clearly, if you look at the '058 Patent, both
22 Mr. Batchelder and Mr. Crump are inventors and he signed
23 this declaration. I don't know if this one preceded the
24 other, but clearly Mr. Crump knows about the patent.

25 These three patents have nothing to do with the

1 use of ABS plas -- patents, or with -- one is to
2 stereolithography, Your Honor, and that is a technology
3 where you have a vat of goop. And what happens is a layer
4 is laid down and a laser comes by or a UV light heats part
5 of it, and then they put another vat of goop. It has
6 nothing to do with FDM.

7 And the other one doesn't disclose any kind of
8 heating cabinet there. So, we have the whole overt
9 misstatement in the patent, itself, saying we just invented
10 70 to 90 degrees with ABS plastics, which wasn't true, and
11 then they mischaracterize it in this misstatement that, you
12 know, it is novel over all of this prior art.

13 And this is exactly on all four corners with
14 *Aventis, W.L. Gore and Cumberland*. And this is what we
15 allege in the pleadings with specificity. We say the
16 statement that they made, we give the statement, and we give
17 precisely the prior art that invalidates that statement.
18 This is an overt misrepresentation.

19 And where you have a misrepresentation, that is
20 enough to plead inequitable conduct.

21 THE COURT: Well, and then -- and you've --
22 obviously, one of you has to be incorrect today, because
23 obviously you have heard, consistent with their brief,
24 Plaintiff's suggest: Look it, it isn't simply enough to
25 say -- and I am sure you are going to touch on it. I have

1 used the word, well, it is so obvious, you don't have to
2 break it down by limitation or this specific claim, but they
3 are suggesting: Well, it is not enough what they have
4 alleged. Saying it so doesn't make it so. But, did I
5 oversimplify your argument when we were exchanging about the
6 it's so obvious phrase?

7 MR. CASS: Yeah, it is so obvious, Your Honor,
8 that there is no way that these inventors associated with
9 this company -- this isn't this abstract concept of, oh,
10 well, we had this parallel patent application in Germany.
11 And oh, my goodness, there was a reference cited there. Oh,
12 and you didn't cite it in your U.S. case. This is an overt
13 statement to the Patent Office about the novelty of this
14 entire patent.

15 Every single -- if you look at the -- and I won't
16 switch to the elmo because -- I probably will -- well, let
17 me just switch to the elmo for a second just to show you how
18 obvious this is. Is that the camera, doc camera?

19 THE COURT: We can probably do that. Shall I do
20 that here? Oh, you got it.

21 MR. CASS: I think so.

22 THE COURT: I think so.

23 MR. CASS: I am not always the sharpest bulb.

24 Every representation in this patent, Your Honor,
25 is about this magic 70 to 90. And it is not above 70, as he

1 referenced. The words are actually approximately 70. That
2 is a weasel word in patent law. And that is why the whole
3 thing is replete with fraud. And so it went right through
4 the Patent Office.

5 Yeah, sure it did, because they never told the
6 Patent Office about the prior machine. And that is exactly
7 the problem with these, the cases that I cited, and they are
8 right on point, because it is the same thing where the
9 inventors, themselves, it's their own prior art that they
10 are working with, their own product that was on sale. They
11 have a duty of candor. They have to tell the Patent Office
12 what products are on sale. And what the attributes of those
13 products are if they are trying to make, you know,
14 distinguishing features to advance it. So, the whole, the
15 whole patent is replete with misrepresentations. Every
16 major figure they cull it out. So, let me just -- I want to
17 talk about the fraud.

18 Now, in the answer and counterclaim, they are
19 cherry-picking some of the statements that were made. We
20 actually pled quite a bit about that porosity patent. We
21 went through in great detail and we also alleged it was all
22 of the claims, because all of the claims were going to rise
23 or fall on their arguments over the prior art.

24 Let me get to 35. And it is on page 37 of our
25 answer and counterclaim, Your Honor. So, what happens is --

1 I'm sorry, it is 38. He only cited part of the answer and
2 counterclaim. See, during the prosecution, all claims, all
3 claims -- we have identified all claims were rejected by the
4 Examiner. And the Examiner made specific, you know,
5 rejections over two pieces of prior art.

6 And he says the word porosity isn't mentioned
7 anywhere in the patent? Paragraph 47 is their statement
8 about porosity. And he completely ignored this this
9 morning. And it says, "Neither CIMA I or CIMA II suggests
10 the adjustment of the rate of dispensation of the material
11 made to control the porosity of the article being formed."

12 They are the ones that interjected the word
13 porosity. And the porosity word appears in the claims.
14 This is the applicant for the patent, okay? And then we
15 cite the prior art. And at paragraph 51, we give specific
16 statements as to why adjusting the rate of dispensing to
17 affect porosity was known. And it was known because of
18 their own '329 Patent. Okay?

19 Where they talk about varying, using
20 interchangeable orifices which changes -- it is kind of like
21 plumbing. I am not a great plumber, but if you have a
22 bigger hose, you can put down -- a fire hose puts down a lot
23 more stuff than a garden hose.

24 And then they also talk about a variable-sized
25 orifice, which also changes the dispensing. And then, after

1 we allege this, we came to learn that the very feature they
2 are suing us on -- I just want to with switch back to the
3 lectern PC. So, in other words, a lot of this has been
4 cherry-picked in terms of the argument, but there is a lot
5 of great detail in the answer and counterclaim.

6 Now, I find this really interesting. In the
7 Complaint, Your Honor, they allege that because this company
8 changes the fill settings -- this is exhibit -- this is
9 paragraph 26 of their Complaint. They are saying that
10 because the fill settings are changed, that is how Afinia
11 infringes the patent, right?

12 Well, their own 1500 device in 1994, if you go
13 down to road width, and this is a little bit harder to see,
14 but you can see you can change the nozzle size, but you can
15 also change the road width. It goes from .04 maximum, or
16 .001, for example, under the .010 nozzle. Right?

17 THE COURT: Right, I have got it.

18 MR. CASS: So, they are able to change the road
19 width, the very feature they are suing Afinia for within
20 their 1994 machine. And also, and that makes sense because
21 that patent I just showed you shows you can vary the tip
22 diameter, and they didn't disclose it.

23 So, here is another situation where you have an
24 overt misrepresentation by the Plaintiffs of the status of
25 the prior art, and why the patent should be granted, when

1 their own technology, both the patent that wasn't disclosed
2 and the 1500 machine that wasn't disclosed provided for
3 adjusting the rate of dispensation.

4 And I have bolded it at the bottom, but this is
5 alleged in our counterclaim, Your Honor, neither CIMA I nor
6 CIMA II suggests that the adjustment of the rate of
7 dispensation of material may be made to control the porosity
8 of the article being formed. That is directly on point to
9 the withheld evidence. The only reasonable inference from
10 this -- and we are entitled to a reasonable inference, I
11 believe, on this, and all facts are assumed to be true at
12 this stage; is that this was done to procure the patent.

13 Now, we asked for phase discovery, and they
14 rejected that. We wanted to do some phased discovery. We
15 didn't have a discussion. But, I think that we have clearly
16 met the burden that is required of us on equitable conduct
17 for these two patents under those three cases I mentioned,
18 *Aventis, W.L. Gore and Cumberland.*

19 So, now I want to talk a little bit about the
20 patent misuse if Your Honor doesn't have any questions.

21 THE COURT: All right. And what -- I mean, it may
22 not even be a fair question. What do you hope that the
23 discovery would show? Obviously, in the brief you state
24 that there's -- you use the phrase, this is premature
25 because discovery will kind of reveal what we claim they are

1 concealing.

2 MR. CASS: Right. We also think that, you know,
3 we're very lucky. We were able to get a 1994 and 1995
4 version of their prior machine. I was in another one of
5 these and it took us several years. People knew of it, we
6 couldn't locate it, but we already have it.

7 There are some other things going on, Your Honor.
8 One of the reasons why Your Honor is probably saying, well,
9 why is Mr. Cass alleging all of this monopoly business in
10 his claims? And it kind of ties in a little bit to the
11 patent misuse, and this is how it does, Your Honor. The
12 greater your market power -- and I have shown the Court some
13 evidence. We have excellent evidence of market power
14 against Stratasys.

15 The greater your market power, the more scrutiny
16 the clawback provisions of a license are given. And that's,
17 I believe, under the Department of Justice guidelines. So,
18 the patent misuse, yes, we have absolute fraud in the '058
19 and the '925 Patent, right? But, the licensing scheme, if
20 you look at the license -- and they have got all of these
21 licenses included, you know, under the terms of their
22 license. They are requiring any customer to give them any
23 improvement patent on any of their patents, regardless of
24 what country they are in, wherever they buy a machine. So,
25 they are expanding, first of all, the scope of their

1 intellectual property.

2 Because if you are in Istanbul and you bought a
3 Stratasys machine and now, you know, you invent something,
4 they don't have patents in Turkey, but they are going to
5 require a clawback provision to obtain all of those rights.
6 And that is another instance where I think to some extent
7 the counterclaim is a little bit cherry-picked.

8 Yes, there's allegations about monopoly and market
9 power and all of those other things, and I am entitled to
10 have additional facts in my counterclaims, because I want
11 them to admit or deny those. But, those also weave into the
12 patent misuse theory. Because, again, the greater -- this
13 is how GE got in trouble in the 1940's with patents because
14 they had such a market on the incandescent light. So, the
15 greater your market power -- it is a factor to show it
16 violates the rule of reason, because of who you are and
17 where you sit.

18 And what the patent misuse counts say is you can't
19 impermissibly broaden the scope of your patent. And that
20 can be by time, by jurisdiction, and by geography. Which,
21 if you look at that license, I think it violates all three.

22 Now, it is an interesting defense, because if that
23 defense is proper and lodged, and lodged correctly, and I
24 submit that it is, because we've referenced the license, we
25 made allegations about how it enhances the scope of their

1 patents. That defense prohibits them from getting any
2 damages until they stopped that licensing program. So, it
3 is a valid defense. And that is why these things still come
4 up. And I will just cite some of the cases --

5 THE COURT: So, what of their observation -- they
6 had it in their reply brief and a focus today about, well,
7 the defense has changed their theories. One, it is not
8 pled. Two, it is a different theory now than it was, so
9 maybe, perhaps, they have abandoned the other.

10 What is most important for me to know now about
11 that?

12 MR. CASS: I think what is most important for you
13 to know is that under each count -- yes, I have additional
14 facts I want them to admit or deny; and that is true. But,
15 the operative facts for the count, I didn't allege monopoly,
16 I haven't alleged monopoly, yet. I haven't alleged
17 antitrust yet. Those are paragraphs in there, but that is
18 not what is being alleged.

19 What is being alleged is patent misuse based on
20 two theories. One is the inequitable conduct of the two
21 patents at issue, and the other one is that the asserted
22 patent is part of the license for part of the patent misuse.

23 And if you go to the cases that talk about patent
24 misuse, like windsurfing, you know, when you try to tie the
25 validity of a trademark with a patent, that is an example of

1 patent misuse. *Atlanta Pharma*, where you are treating the
2 patent as if it is in force beyond the date of its
3 expiration, that is another example.

4 If you violate a reasonable and nondiscriminatory
5 license scheme where you are supposed to license out the
6 technology, that is another example of patent misuse.

7 If you make a misrepresentation over a standard,
8 you know, if you are in an industrial standard and you have
9 misrepresented the scope of your patents as participating in
10 that standard, that is another example of patent misuse.

11 So, patent misuse is still there. The question for the
12 Court is -- and it is really a legal question because you
13 have the provision in front of Your Honor. Your Honor can
14 see the provision from the contract. It was attached to our
15 defense as Exhibit A. Your Honor can look at that as a
16 matter of law and see if our interpretation, I suppose, is
17 legally plausible, and I believe it is. And we have alleged
18 that in our counterclaim.

19 I think right after we alleged how much market
20 power they have, we get into the license and how the license
21 is invalidated. It is roughly on page -- it bridges pages,
22 I will say, it bridges pages 9 through, roughly, Page 12 or
23 13 -- yeah, Page 12. And then those counts, those
24 paragraphs are incorporated in the other affirmative
25 defenses.

1 But, what is being alleged is that the clawback
2 provision isn't limited in time. It is a contract of
3 adhesion. It purports to cover expired patents. It is not
4 limited in geographic scope. It purports to cover patent
5 rights for third parties; that it requires a customer of
6 Stratasys to share their invention with 50 percent of the
7 market, because that is their rough market power if you add
8 up what the industrial studies say and their recent
9 acquisitions.

10 So, from my point of view, that has been very,
11 very well pled. There were specifics, but Your Honor can
12 look at paragraph 8.2 and make the call as to whether that
13 is legally plausible. And we said why it isn't. And that
14 is a defense.

15 As long as -- if I am correct that that is an
16 illegal provision and that they are using it and that they
17 have market power and that it violates the rule of reason --
18 because that is the test, on a clawback provision, is
19 whether it violates the rule of reason, given their market
20 power, then I have adequately pled it.

21 But, to kind of just sum up, here, because, you
22 know, I tried to read all of the cases before today and I
23 think I was up until 1:00 in the morning last night. And
24 you read so many cases where a court allows it or a court
25 doesn't allow it on inequitable conduct. And you start

1 scratching your head and say: Well, what is enough and what
2 isn't enough? And really, I think those three cases, when
3 you go back to -- this FDM machine didn't fall from Mars.
4 This was known to them. This was their product. And the
5 '058 Patent was all about this magic range. And they knew
6 it.

7 And this is a difficult area of the law. It
8 requires a lot of honesty and integrity both at the Patent
9 Office -- especially at the Patent Office. And I think that
10 those cases, *Aventis, W.L. Gore and Cumberland Pharm.* are
11 all talking about the exact kind of behavior.

12 I find it almost unimaginable that in both of
13 these patents there was no disclosure of their own devices
14 and prior products. They have a duty of candor. They
15 signed that under oath. And where you have an overt
16 misrepresentation of the prior art and the problem to be
17 solved, which is what both of these two patents had, and it
18 is your own, and you don't disclose it, that is where courts
19 have said, you are entitled to a reasonable inference that
20 that was done with intent to deceive to get the patent.

21 And here, you know, they said, well where did the
22 porosity thing come from? This is specifically alleged in
23 the counterclaim in relationship to the Patent Office's
24 denial of all of the references. So, we have to be careful
25 we don't cherry-pick one part of the counterclaim, because

1 this is what they said, and we referenced exactly what they
2 had in their possession with that '329 Patent that had the
3 variable nozzle that could -- and also, now we've learned of
4 the road width.

5 But, in any case, we have enough to even consider
6 a summary judgment motion, we believe. So, I think that we
7 can get well beyond inequitable conduct at the pleading
8 stage, Your Honor. So --

9 THE COURT: All right?

10 MR. CASS: Thank you very much.

11 THE COURT: Thank you. I may give you the last
12 word after rebuttal here before we are done. Lawyers rarely
13 pass up the opportunity, but we will see.

14 MR. GRIMSRUD: Thank you, Your Honor.

15 THE COURT: I will give you a moment here to --

16 MR. CASS: I'm sorry.

17 THE COURT: I guess for lack of a better word,
18 obviously, the line has been drawn, I guess, in the sand or
19 down the courtroom. You heard what counsel said.

20 MR. GRIMSRUD: Yeah, I think, Your Honor, some
21 comments in rebuttal. One, this is showing -- counsel's
22 argument showed the importance of identifying the claims and
23 claim limitations when you are trying to allege inequitable
24 conduct. Much of the discussion on the -- I will start with
25 the '058 Patent, which is on the heating that he had talked

1 about.

2 And he talked about the specification a lot where
3 it says approximately 70 to 90 degrees it talks about. The
4 claims are what you need to look at, not the specification.
5 The claims, you know, are what matter in the case. And this
6 is the type of thing that is not mentioned in their pleading
7 is that Claim 1 of the '058 Patent says that the -- it is
8 dispensing a material having at least a local region
9 temperature that exceeds the solidification temperature --

10 THE COURT: Can we slow it down just a little bit?

11 MR. GRIMSRUD: Yes, sorry.

12 THE COURT: I mean, we all have a tendency when we
13 are reading something to pick up the speed, but --

14 MR. GRIMSRUD: Yes.

15 THE COURT: -- for the benefit of my court
16 reporter, even though, at least, we have a reference here.
17 But, if you would please? Thank you.

18 MR. GRIMSRUD: Thank you, Your Honor, I apologize.
19 The patent in Claim 1, for example, says that the
20 temperature has to exceed the solidification temperature, so
21 it has to be above it.

22 And the FDM 1650 product that he was talking
23 about, he says went up to 70 degrees, which does not exceed
24 the solidification temperature. You know, these potentially
25 could be claim construction issues, but they have not

1 explained how the FDM 1650 teaches something that exceeds
2 the solidification temperature of the thermally
3 solidifiable material.

4 Instead, what they have done is they have looked
5 at the specification, and they focused on statements in the
6 specification; but, the claims specifically say that it has
7 to exceed the temperature. And the FDM 1650 that they have
8 been talking about says it goes up to 70 degrees, which
9 would not exceed the solidification temperature for the ABS
10 material.

11 THE COURT: Well, and I don't think you are
12 implying, and perhaps neither party is; but, I will soon
13 find out. Obviously, you said: Well, you used the phrase
14 claim construction. Obviously, if we were here at a *Markman*
15 hearing, then where we usually end up going is the
16 specification.

17 So, obviously, you are suggesting, well, we don't
18 really need to get to that, but here is what the claim says
19 versus the specification. And I am not -- I think it is
20 highly unlikely, and maybe neither party is suggesting that.
21 I believe that I can make a ruling on the case without doing
22 any claim construction. Because obviously if one of you
23 say: Well, no you can't. Of course, then we have the
24 Defense point of view. And you heard me say this before.
25 And you are commenting on it now; and that is, well, same

1 inventors, same product, same prior art. It is that "so
2 obvious" argument that it's -- I will use the phrase -- it
3 wasn't counsel's phrase, but it jumps off the page or the
4 pleading, it is so obvious that this was fraud; that they
5 didn't disclose this prior art. I mean, that is really
6 where the two of you very dramatically part company and you
7 were just commenting on that.

8 MR. GRIMSRUD: Yes, Your Honor, we don't think
9 claim construction is needed now. Our only point is this is
10 an example of why it is important in your pleading to be
11 specific with inequitable conduct and say which claim you
12 are talking about and which claim limitation you are talking
13 about.

14 Because in our view the FDM 1650 is not at all
15 relevant, certainly not "but for" material, because the
16 claim says you have to exceed the solidification
17 temperature.

18 So, it really goes to the higher level point of in
19 order to plead inequitable conduct, you need to be specific.
20 You need to identify the claims, the claim limitations, and
21 explain where those limitations are met by the prior art.

22 And, you know, counsel talked about the '058
23 Patent, also discussing the '329 and other patents. And
24 this is, I believe, from the specification of the '058
25 Patent, where it actually says that the patents that were

1 disclosed to the Patent Office teach a build environment
2 that is maintained at and below the solidification
3 temperature.

4 So, the inventors told the Patent Office that
5 there was other references that taught maintaining the
6 temperature at the solidification temperature, which is what
7 we -- but what the claims say is you exceed the
8 solidification temperature. And they have not explained,
9 alleged, how the FDM 1650 exceeds the solidification
10 temperature. So, they have not explained at all in their
11 pleading how the FDM 1650 is not just cumulative of other
12 references that were given to the Patent Office. So, this
13 is another example of the lack of specificity resulting in
14 dismissal under 12(b) (6).

15 The '925 Patent is -- there are similar issues on
16 their materiality allegations that they talk -- this is the
17 porosity patent. And counsel talked about controlling the
18 porosity. The claims say "predetermined porosity." It is
19 about an invention that you are able to establish this
20 predetermined porosity.

21 And the '329 Patent, which I don't know if I
22 misheard counsel or not, but he was suggesting that -- I
23 believe that counsel had this slide up or a slide showing
24 this information and said that the inventors did talk about
25 porosity with the Patent Office in prosecuting the '925

1 Patent.

2 What we were saying was that the '329 Patent,
3 which was -- which is the one that they are basing their
4 inequitable conduct charge on, that patent, the '329 Patent,
5 doesn't mention porosity. Whereas prior art that was given
6 to the Patent Office does mention porosity. And they have
7 not explained how the '329 Patent could possibly be a "but
8 for" material reference when it doesn't even mention
9 porosity. And the references that were given to the Patent
10 Office discuss porosity.

11 And in fact, this is another one of counsel's
12 slides. Their argument is that the '329 Patent, while it
13 doesn't maybe mention porosity, it is about controlling
14 porosity. That is what they say -- or that it would allow
15 you to control porosity; that is in Afinia's argument.

16 Well, this again, as they show in their slide
17 here, this is a section from the prosecution history of the
18 '925 Patent where the applicants told the Patent Office that
19 this prior art that was given to the Patent Office simply
20 states that porosity can be controlled.

21 So, there was no mystery that porosity can be
22 controlled. The patents told the Patent Office that. And
23 they have not identified how, in their pleading, how the
24 '329 Patent discloses anything more with respect to
25 porosity. And in fact, it doesn't even mention porosity.

1 So, it would seem actually much less relevant than CIMA
2 references.

3 You know, the same with -- we didn't hear much
4 about allegations for who specifically knew of the material
5 information and factual allegations about intent to deceive,
6 which I won't get into again, but in our view they have not
7 alleged any facts about a certain person attempting to
8 deceive the Patent Office.

9 Back to the Court's comments about case management
10 at the beginning of the day? One suggestion we would
11 propose is that one option would be, since a lot of this is
12 now starting to delve into claim construction and things
13 like that is if we could put a deadline after claim
14 construction for seeking leave to amend the pleadings, so
15 after discovery, after claims had been construed, there
16 would be a deadline to amend the pleadings with respect to
17 inequitable conduct. That would be one option, to try to
18 have a structure in place with specific deadlines.

19 THE COURT: Well, and of course, I want to be
20 sensitive to the concerns of both parties. One of the --
21 one of the criticisms of -- and somewhat legitimate ones
22 these days in Federal Courts, although it comes more in the
23 context of e-discovery. But, they are saying, well,
24 aggressive but fair case management early on in the case
25 helps control the scope of discovery. But, you are

1 suggesting that however it comes out, that that may not be
2 the paramount issue from your client's point of view. So
3 that, hence, one way to do that is if that amendment date
4 would be -- we will see what defense counsel says shortly
5 after any *Markman* hearing and claim construction order.
6 Then that would be -- it would be hard for the defense to
7 argue that, one, it would be apparent what the record is,
8 although the defense is saying it is apparent now. And two,
9 then the record would be what it was. And then we would
10 know once and for all, from your point of view, well, we
11 said before and we will say it again: There is no record of
12 inequitable conduct, and also relating to some of the
13 affirmative defense issues.

14 MR. GRIMSRUD: Exactly, Your Honor. Everybody
15 would know the scope of the claims. And everybody would
16 have presumably taken the discovery they wanted to take and
17 that would be a sensible deadline, in our view.

18 THE COURT: All right. What I will probably do,
19 absent some agreement of the parties, just to be fair to
20 both parties, I will rule on what's in front of me, but then
21 I am not saying you have to retreat back once my decision is
22 made, regardless of what it is, I am not suggesting then
23 because it has come up today, even if a short -- once you
24 get my decision, if one or both parties would say: Well,
25 can we have a five minute on or off the record status

1 conference with the Judge? Because, let's nudge or let's
2 bump the -- let's move this amendment date.

3 I'll just make sure I deal with this. Obviously,
4 I acknowledge that with or without your agreement, that is
5 one thing I could do. And have some attorneys done it with
6 or without agreement, or courts in the past? Yes. It can
7 be very fact specific to a particular case, because as you
8 all know, one size rarely fits all. All right?

9 MR. GRIMSRUD: Okay. And Your Honor, I will close
10 out on the patent misuse.

11 THE COURT: All right.

12 MR. GRIMSRUD: Their theory that is pleaded in
13 their defenses is based on assertion of the patents. And
14 that, in our view, is clearly and legally foreclosed. And
15 they have not alleged patent misuse based on this licensing
16 theory, which I won't get back into all of the details; but
17 again, we believe it is just a speculative and unreasonable
18 reading of this license agreement and doesn't have support
19 in the case law.

20 And I wanted to also mention, Your Honor, on the
21 case management issues, we did actually discuss -- my
22 colleague pointed out, Mr. Liebman pointed out that we did
23 discuss at the scheduling conference on the patent misuse
24 issue for discovery --

25 THE COURT: All right.

1 MR. GRIMSRUD: That, you know, we reserve our
2 right to limit discovery if we thought the discovery was
3 going too far into patent misuse, market-type things. So,
4 we did reserve that right to the extent we thought the
5 discovery was excessive --

6 THE COURT: And in fairness to both parties, even
7 if we weren't here today, that is the whole purpose of some,
8 you know, early on and -- but even-handed case management.
9 Obviously, if hadn't been discussed, frankly speaking, I
10 don't think either side would be very successful in
11 convincing a Judge that, well, since it wasn't discussed, it
12 is waived. I mean the "W" word, waiver, is a pretty hard
13 one to convince some -- if it is a case management issue.
14 So, that makes -- I understand that. So, all right?

15 MR. GRIMSRUD: All right. Thank you, Your Honor.
16 We'd ask that the counterclaims be dismissed and the
17 affirmative defenses stricken.

18 THE COURT: Would you like the final word,
19 Counsel?

20 MR. CASS: I would, Your Honor.

21 THE COURT: I thought you might.

22 MR. CASS: I just wanted to point out two things,
23 because this is the pleading, itself. It wasn't -- he just
24 mentioned it was -- they disclosed that they could control
25 porosity. That is not what the statement was.

1 It was, neither suggests the adjustment of the
2 rate of dispensation of material. Neither show changing the
3 rate of dispensation as the actual statement. It wasn't
4 controlling porosity, because that was conceded, it was
5 adjusting the rate. And that is in our pleading.

6 And then if you flip -- we talked about that prior
7 art. And then if you flip a few pages, we state in
8 paragraph 51, at all times relevant to the disclosed varying
9 the rate of dispensation, which is because, and we emphasize
10 this for the Court, it can change the orifice tip, they can
11 change -- they can vary the orifice. So, I just wanted to
12 make clear that Your Honor understood that we actually pled
13 the very distinct reason. That is why it was a
14 misrepresentation.

15 And then also on the '058 Patent I wanted to just
16 point out that he then -- he referenced the claim, and he
17 referenced -- he said, oh, that doesn't talk about above.

18 The very provision that we cited in paragraph 63,
19 this talks about the difference between solidification and
20 creep relaxation. Creep relaxation temperature is something
21 that only an engineer could come up with. But, it has to do
22 with how the element is sort of like cooled in this range
23 of, range of heating, so that there is better material
24 properties within it, and I am oversimplifying it.

25 But what is important here is they say in the

1 patent that the solidification and its creep relaxation
2 temperature, you know, they say maintain it at a temperature
3 that is preferably in a range between the solidification
4 temperature and its creep relaxation temperature, and then
5 they give the actual example.

6 "Preferably, it should be maintained closer to the
7 creep relaxation temperature. In the case of *ABS Plastics*,
8 temperature window falls between 70 and 90." So, it is
9 right in the pleadings and it is exactly what they said and
10 it was exact misrepresentation, because they had already
11 been maintaining it at 70 degrees Celsius.

12 I just wanted to point that out because when a
13 counterclaim gets cherry-picked paragraph by paragraph,
14 sometimes you lose track of what was actually alleged, and
15 we alleged specifically what it was that they said, which
16 was an overt representation, and that goes back to the three
17 cases. I won't bore you by mentioning those cases again,
18 Your Honor. So --

19 THE COURT: Thank you. I didn't see you leaping
20 out of your chair, Mr. Grimsrud, but is there anything else
21 you would like to --

22 MR. GRIMSRUD: Nothing further, Your Honor.

23 THE COURT: I will turn on -- back off the mood
24 lighting here, so to speak.

25 I will thank you each for your arguments. I will

1 deem it submitted. I will have a memorandum and opinion out
2 to you in no more than 60 days, and hopefully it will be
3 less. I am assuming unless that creates -- depending on
4 what you have scheduled with the management order in place,
5 that if there is -- if one or both of you are now thinking:
6 Well, the Judge doesn't know it, but here is what is going
7 to become an issue right away, then I suppose I should know
8 that now.

9 MR. CASS: The only thing I would mention, Your
10 Honor, Afinia is a very small company, and we are in the
11 process of trying to do electronic discovery. We think to
12 do it right, is to do it once, because they are so small.
13 And that is just one issue. And, you know, it would be
14 helpful for us, I think, to get all of these issues
15 resolved.

16 We have engaged an expert. I think we would be
17 ready, I think, to file some summary judgment motions on
18 some of this stuff fairly quickly. So, my preference is to
19 try to do -- you know, the poison in these cases is often
20 just the discovery expense.

21 THE COURT: That is true. Well, do you think
22 there is a -- I will ask Plaintiff's counsel, too. Do you
23 think that given the time frame now that there's -- you
24 could probably agree on something that seems fair to both
25 parties? Or are you saying: No, we can see right now we

1 are headed into a disagreement on that until we get your
2 decision? What's --

3 MR. LIEBMAN: Your Honor, the state we are at
4 right now is that there is a wave of written discovery and
5 interrogatories out and neither party has responded. The
6 first discussion on electronic discovery I think will be
7 next time. So, right now we are at the beginning of the
8 discovery phase.

9 What makes sense in this case, as I think in most
10 other cases, is we do the claim construction for all four
11 patents. Moving ahead on two of the patents makes no sense.
12 We still have the other two patents.

13 So, we ought to do this discovery, take up the
14 discovery disputes with the Magistrate, and they will get
15 all of the inequitable conduct discovery they want
16 irrespective of the ruling, and do the claim construction.
17 And then if they want to keep this in the case, they can
18 seek leave to amend if it's Your Honor's position.

19 I don't think any special procedures are called
20 for here. This is no different than anything else. And one
21 comment about their being a small company? We are hoping
22 that they are not trying to do asymmetric discovery, saying
23 they don't -- that Stratasys has to spend millions of
24 dollars responding on discovery, meanwhile they will try to
25 use the small company status as a shield. We think that the

1 parties should try to get together and try to limit
2 discovery to the issues. And inequitable conduct, we are
3 going to give them the discovery they want. There is no
4 issue here.

5 THE COURT: Well, why don't we do this? Why don't
6 you, if you get to the point in the -- whether it is in the
7 next few days or next couple of weeks where you say: Well,
8 we now think, with or without the Judge or Magistrate
9 Judge's involvement, this isn't what was contemplated. And
10 here is how the discovery would be affected by getting the
11 Judge's decision earlier, rather than later. We don't want
12 to be duplicitous or something else. Then I assume with the
13 permission or notice of the other party, we will pick up the
14 phone, and I will make sure the Magistrate Judge knows:
15 Well, they are going to meet and confer. And I predict this
16 will get resolved in such a way that -- because the irony
17 is, usually it is coming from the other side on a motion
18 like this, saying: Well, here is the discovery we shouldn't
19 have to give unless we lose on this motion, whether
20 inequitable conduct -- but, if there is some concern about
21 that, I assume somebody will pick up the phone. And one of
22 us, without dragging everybody back to court, one of us will
23 take care of it. But, I will let Magistrate Judge Graham
24 know, too, that we may or may not get that call.

25 MR. LIEBMAN: Right. Let me just clarify what I

1 said.

2 THE COURT: All right.

3 MR. LIEBMAN: I don't think we are going to have
4 any discovery disputes regarding inequitable conduct. We'll
5 give them all of that discovery.

6 On the other hand, the misuse defense, to the
7 extent it asserts market type issues and they seek broad
8 discovery, that is where I can see there being discovery
9 disputes.

10 THE COURT: All right. Why don't you see, if that
11 is the case, we will -- because sometimes I think it's --
12 well, I don't think, I know it is unfair to parties whether
13 it is this context or something else to say: Don't bother
14 us, work it out. That is why we are here. If you can't
15 work something out, then that is our responsibility to give
16 you immediate access to us and make a decision.

17 So, if there becomes an issue there on scope,
18 whether it is the misuse issue or another one, you will have
19 access to one or both of us, and there won't be some fancy
20 or delayed motion practice. We will make the call on it.

21 MR. CASS: I don't anticipate going on a fishing
22 expedition. It is an unusual situation. I think Your Honor
23 has seen me -- we've actually referenced the industrial
24 support we have of very solid evidence of their market
25 power. And usually that is what those fishing expeditions

1 are out trying to get. So, I think there is some concern, I
2 think, on my client that they have contacted all but the
3 Plaintiff on that. You know, we will get that in the normal
4 course of the --

5 THE COURT: Well, so, if there is an issue,
6 whether it is that or something else, give us a ring and one
7 of us will give you immediate access to us.

8 MR. LIEBMAN: Thank you, Your Honor.

9 MR. CASS: Thank you, Your Honor.

10 THE COURT: Thank you all. Have a nice weekend.
11 We are adjourned.

12 And for the folks here for the Franklin matter, as
13 long as it takes to have counsel pack up and go and you come
14 up to counsel table, we'll move right into it shortly. So,
15 we will stand in recess for the next couple of minutes.

16 | Thank you.

17 (Adjournment.)

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Certified by: s/ Jeanne M. Anderson
Jeanne M. Anderson, RMR-RPR
Official Court Reporter